(17)

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,
vs.
ALLEN A. McDONALD, Sheriff of Ingham County,
Respondent and Appellee

REPLY BRIEF FOR PETITIONER

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REPLY TO COUNTER-STATEMENT OF FACTS

We are criticized for having "conjured up" the term "Inquisitor." As counsel for the State well knows, we adopted that term from an opinion rendered by Justice Cardozo in holding unconstitutional a similar statute. In *In re Richardson,* 247 N. Y. 401, he said:

> "Witnesses were subpoenaed to attend before Judge Scudder in a preliminary investigation and were examined in his presence after being placed under oath. Counsel for the accused official was denied the opportunity to be present and denied a transcript of the record or other information as to the substance of the testimony. The depositions of witnesses were treated as equivalent to office notes of counsel, memoranda for their private use in prospective litigation. They were not in any public record, subject to public scrutiny or to the inspection of opposing counsel. They were never to be so embodied except as insofar as it may happen that their contents may hereafter be repeated at the hearing. A preliminary investigation thus restricted is not a hearing by a Judge. *It is a search by an Inquisitor.*"

The above observations of Justice Cardozo apply word for word to Inquisitor Carr's proceedings.

We use the term "inquisitor" merely as a simple means of distinguishing the acts of Judge Carr as a court and his activities as an investigator. Calling the latter a one man grand jury proceeding does not change their nature; for grand jury proceedings are uniformly recognized as "inquisitorial" in character (e. g., *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652, 26 S. C. Rep. 370).

Exception is taken to our statement that inquisitorial sessions are sometimes held in secret locations. It is true this fact does not appear in the record below. But to give this court the background it is stated in our petition, and in Michigan it is a matter of common knowledge. (The author of this brief personally conferred with Judge (now Senator) Ferguson at his secret inquisitorial chambers in the National Bank Building in Detroit.)

Other matters in the Counter-Statement will be answered in the body of the argument.

ARGUMENT

I.

We advanced, as the basic proposition in this case, that the due process clause of the Federal Constitution requires that one charged with contempt not committed *in open court* be given notice and a hearing.

This proposition respondent does not challenge. But he seeks to avoid its effect by asserting that petitioner was convicted of contempt under the Michigan Inquisitorial Statute, and not under the Michigan General Contempt Statutes.

There are two answers to this contention:

1. Respondent's argument assumes that there is some difference between the powers of an inquisitor and of a court, that the sphere of the inquisitor in contempt matters is broader than that of a court, and that an inquisitor is beyond the limitations imposed by the Federal Constitution. This assumption is manifestly baseless. In an inquisitor's proceeding there is absent the basic fact which justifies a *court* in proceeding summarily,—the necessity of prompt vindication of the dignity of the *Court,* (not of the *judge),* before the public *(Cooke, v. U. S.,* 267 U. S. 517, 45 S. Ct. 290, 69 L. ed. 767). It follows that an inquisitor may never punish summarily.

2. Petitioner was not convicted under the Inquisitorial Statute. The latter authorizes the inquisitor to imprison a witness who fails to appear or who refuses to answer. But Judge Carr as inquisitor pronounced no sentence of contempt. Instead he *recessed his inquisition, opened court* and after reciting that he had been conducting an investigation under the One-Man Grand Jury Statute, that peti-

tioner had appeared before him as a witness and that petitioner had refused to answer questions, stated that it became "the duty of the *court* * * * to adjudge said Francis P. Slattery guilty of contempt of *court* (R. 9)." Thereafter he entered a written order adjudging petitioner guilty of contempt of *court* (R. 7). And no order ever was entered adjudging guilt of contempt of the "one-man grand jury."

II.

The major premise of our second proposition is thus stated in our heading (petition p. 11): "A Judge Acting as Inquisitor does not act *as a Court.*"

The State does not offer a challenge to this proposition. Instead of challenging or answering it, the State resorts to the device of misstating our position and then answering the misstatement.

In pursuance of that plan respondent states that our argument is bottomed on the proposition that Judge Carr as inquisitor does not act in a "judicial capacity." That is a gross misstatement. No such doctrine appears anywhere in our brief. Were it decisive we could demonstrate that an inquisitor does not act in a judicial capacity.* But we are unwilling that the issue be confused by the introduction of that question.

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*A Grand Jury's proceedings are not judicial.
Adams v. State of Indiana, 214 Ind. 602, 17 N. E. (2nd) 84, 18 A. L. R. 1095;
State v. Lawler, 221 Wis. 423, 267 N. W. 105 A. L. R. 568;
Coblentz v. State, 164 Md. 558, 166 A. 45, 88 A. L. R. 886.

An examining magistrate does not act judicially.
Ocampa v. U. S., 234 U. S. 91, 34 S. Ct. 712, 58 L. Ed. 1231.

Nor does a Commissioner in the United States Courts.
Todd v. U. S., 158 U. S. 278, 15 S. Ct. 889, 39 L. Ed. 982.

And see *In re Richardson*, 247 N. Y. 401, invalidating a statute similar to the Michigan Inquisitorial Statute on the ground that it conferred non-judicial powers on a judicial officer.

So for the purpose of this argument we are willing to assume that an inquisitor acts in a "judicial capacity." But just as a judge who signs an order in chambers may be said to be acting in a "judicial capacity," and just as one may not be punished summarily by a judge for conduct toward the judge in chambers (*Cooke v. U. S.*, 267 U. S. 517, 45 S. Ct. 290, 69 L. ed. 767), so an inquisitor may not punish summarily for a misconduct before him in his secret chambers.

In other words, it is not enough that a judge be acting judicially to justify summary punishment. He must be holding *court* when the alleged contempt occurs.

III.

We advanced the proposition that a summary conviction based upon perjury, of the falsity of which the court has not personal knowledge, is a denial of due process (petition p. 12).

This basic proposition is not challenged by the respondent. But he seeks to avoid its operation by claiming that petitioner was not convicted of contempt based upon perjury alone.

To this there are two answers:

1. A summary conviction by an inquisitor for *any* contempt is a denial of due processe. Our argument is that a conviction for perjury, even if the perjured testimony had been given in *open court* is a denial of due process. Here there is such conviction and such denial of due process. It matters not therefore whether there was a conviction upon any other charge as well.

The fact is the sole basis of conviction is perjury.

When Judge Carr recessed the inquisition and opened court for the purpose of pronouncing judgment on petitioner, he stated "that the witness has wilfully and contemptuously declined and refused to answer questions of a particular nature put to him in the course of the (inquisitorial) inquiry; and for that reason it becomes the duty of the *court*" to adjudge guilt (R. p. 9). Upon petitioner's attorneys contacting Judge Carr with reference to an appeal he entered his written order in which he recited that he had adjudged petitioner guilty of "having failed and refused to answer proper questions put to him in such inquiry and having conducted himself in a contemptuous manner by returning evasive answers to proper questions propounded to him by the Assistant Prosecuting Attorney in attendance at the inquiry and by refusing to answer such questions, and by failing and refusing to obey the direction of the court to so answer, and by assuming and manifesting an insolent attitude toward this court" (R. p. 7).

Upon an appeal being taken, Judge Carr filed an amended return in which "he denies that said petitioner made truthful answers to questions put to him and states that the said Francis P. Slattery avoided disclosing to said Grand Jury important information within his knowledge" and "that the attitude of said witness upon the stand was contemptuous, his answers to questions propounded to him were evasive, and he failed and refused to answer proper questions propounded to him" (R. 59). Then after setting forth a transcript of part of the record before the inquisitor, he states that "the answers above referred to, given by the said Francis P. Slattery, to many of the questions put to him, indicated beyond question an intention upon his part to be evasive and refrain from testifying to facts obviously within his knowledge" (R. 65).

The partial transcript returned by Judge Carr shows upon its face that the witness never refused to answer a single question, that his language throughout was polite and respectful, and that the sole source of the complaint against him could be only that his answers affirming lack of knowledge were false. Any statements beyond this are mere conclusions misdescriptive of the witness' conduct. And mere conclusions are not binding on an appellate court.

Andrews v. King, 77 Me. 224.
Peo v. Blood, 120 App. Div. 614, 105 N. Y. S. 20.
Peo v. Westchester Co., 116 App. Div. 844, 102 N. Y. S. 402.
Forgan v. Gordon Motor Finance Co., 350 Ill. 445, 183 N. E. 462.

IV.

It is next urged that the principle that this court will acquiesce in the construction of state laws given by state courts of last resort, applies here; and since the Michigan court has passed upon all questions raised, this court will acquiesce in its decision. In other words, the claim is that state courts have the final determination as to whether a citizen's rights under the Federal Constitution have been violated.

That the cited principle has no application to cases involving questions arising under the United States Constitution, has been repeatedly and consistently held by this court.

In *Scott v. McNeal,* 154 U. S. 34, 38 L. Ed. 896, 14 S. Ct. 1108, it is said that the prohibitions of the Fourteenth Amendment "extend to all acts of the State, whether

through its legislative, its executive or *its judicial authorities,*" and it is held:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, then when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute."

In accord are: *Grannis v. Ordean,* 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Coombs v. Getz,* 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866; *Dodge v. Board of Education,* 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57; *N. Y. Rapid Transit Corp. v. N. Y.,* 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024; *Higgenbotham v. Baton Rouge,* 306 U. S. 535, 59 S. Ct. 705, 83 L. Ed. 968; *American Toll Bridge Co. v. R. R. Commission,* 307 U. S. 486, 59 S. Ct. 948, 83 L. Ed. 1414; *Irving Trust Co. v. Day,* 314 U. S. 556, 137 A. L. R. 1093, 62 S. Ct. 398, 86 L. Ed. 452.

V.

Finally it is argued that "the precise constitutional issue which petitioner urges for determination has been decided adversely to him by this court," in *Eilenbecker v. Plymouth County,* 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801.

That case merely decided that a respondent in a contempt proceeding is not entitled to a trial by jury, and can be of no help to this court.

CONCLUSION

It will be observed that the respondent has not challenged any of the propositions which we presented to the court. Instead he seeks to create new issues by misstating our position or by citing palpably inapplicable principles. The court is thus given assurance, from the very character of respondent's brief, of the soundness of the propositions which we have presented.

In our petition (footnote pp. 6 and 7), we indicated the regularity with which Michigan inquisitors violate the constitutional rights of citizens. The matter being thus one of general public interest, and this court being the last recourse of the Michigan citizen in the protection of their rights, the writ should issue as prayed.

Respectfully submitted,

WM. HENRY GALLAGHER,
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